UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

IN THE MATTER OF:

ALIANTE GAMING, LLC d/b/a
ALIANTE CASINO AND HOTEL,

Respondent,

and

LOCAL JOINT EXECUTIVE BOARD
OF LAS VEGAS, CULINARY WORKERS
UNION, LOCAL 226 and BARTENDERS
UNION LOCAL 165 affiliated with
UNITE HERE,

Charging Party.

Case No. 28-CA-126480[1]

RESPONDENT'S REPLY BRIEF TO CHARGING PARTY'S ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS TO ADMINISTRATIVE LAW JUDGE'S DECISION

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[1] On August 27, 2014, the Complaint was consolidated with Case No. 28-CA-131592, which involved a charge filed by Fernanda Chavez. The parties settled that matter during the hearing.

I. INTRODUCTION

Pursuant to Section 102.46(h) of the National Labor Relations Board's (hereinafter "NLRB" or the "Board") Rules and Regulations, as amended, Respondent Aliante Gaming, LLC d/b/a Aliante Casino and Hotel (hereinafter the "Employer," "Respondent," or "Aliante") files this Reply Brief to Charging Party's ("Charging Party or "Union") Answering Brief to the Respondent's Exceptions to the Administrative Law Judge's Decision ("Answering Brief").

II. REPLY

Charging Party's arguments in response to Aliante's Exceptions to the Administrative Law Judge's Decision ("Exceptions Brief") are entirely unconvincing and should be rejected for the reasons set forth in Aliante's Exceptions Brief and below. Aliante submits this Reply Brief for the purpose of addressing the following specific issues:

A. The ALJ's Credibility Findings Should Be Reversed

The Charging Party erroneously posits that "[t]he ALJ's credibility determinations were correct and should not be disturbed." (Answering Brief, p. 17). In general, the "Board is reluctant to overturn the credibility findings of an Administrative Law Judge," *Bralco Metals, Inc.*, 227 NLRB 973, 973 (1977), and "only in rare cases" will it do so. *E.S. Sutton Realty Co.*, 336 NLRB 405, 405 fn. 2 (2001). This is true, however, when credibility findings are based on a judge's assessment of the demeanor of a witness. *V & W Castings*, 231 NLRB 912, 913 (1977). But, the "Board has consistently held that 'where credibility resolutions are not based primarily upon demeanor . . . the Board itself may proceed to an independent evaluation of credibility.'" *In Re Stevens Creek Chrysler Jeep Dodge, Inc.*, 357 NLRB No. 57 (Aug. 25, 2011) (*quoting J.N. Ceazan Co.*, 246 NLRB 637, 638 fn. 6 (1979)). Indeed, the Board has explicitly stated, that in all cases coming before it for review on exceptions, it would base its "findings as to the facts upon a *de novo* review of the entire record, and [did] not deem [itself] bound by the [administrative law judge's] findings." *Jewel Bakery*, 268 NLRB 1326, 1327 (1984).

In its underlying Exceptions Brief, Aliante excepted to a number of the Administrative Law Judge's ("ALJ") erroneously-labeled credibility determinations, which should have instead been labeled as findings of fact. (Respondent's Exceptions (R. Exs.) 10, 11, 15, 16, 17). Specifically, Aliante pointed out that the ALJ's credibility findings were not based on the witnesses' demeanor, but on their seemingly contradictory testimony. As such, Respondent argued that the Board should conduct an independent evaluation of the record testimony. In its Answering Brief, Charging Party argues that the ALJ's credibility resolutions were correct. (*See* Answering Brief, p. 17). Indeed, it contends that the ALJ correctly discredited Respondent's witnesses based on their "inconsistent statements" of the April 3 events. (*See* Answering Brief, p. 19). To support its position, Charging Party goes to great lengths to lay out Respondent's management witnesses' testimony, in an effort to expose their alleged inconsistencies and support the ALJ's credibility findings. The Charging Party's argument, however, fails due to the same defect as the ALJ's decision.

Applying the principles set forth above, the ALJ's credibility determinations with respect to Buffet Manager Bonnie Schafer-Rabonza ("Rabonza"), Aliante's President and General Manager Terry Downey ("Downey"), Vice President of Human Resources Richard Danzak, and Aliante's Team Member Relations and Risk Manager Heidi Heath's ("Heath") must be reversed. First, as supported by the Charging Party's extensive argument regarding Respondent's witnesses' alleged contradictory testimony, the ALJ's credibility findings are not primarily based on demeanor. In fact, the ALJ gave no indication that he relied on Rabonza, Downey, Danzak, or Heath's demeanor in discrediting their testimony. Although he generally *referenced* demeanor,[2] the ALJ did not specifically refer to Downey, Heath, Rabonza, or Danzak's demeanor as a basis for his findings. *See El Rancho Market*, 235 NLRB 468, 470 (1978) (reversing judge's credibility findings where, although the judge generally referred to demeanor, it did "not appear that … [the findings] were based on his observations of the witnesses' testimonial demeanor").

Further, even assuming the Board considers that the ALJ properly labeled his credibility determinations, they should nevertheless be reversed because they are unsupported by a preponderance of

[2] *See* ALJD p. 11, line 25.

the evidence. First, Charging Party incorrectly argues that the ALJ correctly found Maria Lourdes Cruz Sanchez ("Cruz") to be a credible (sic) on key points in dispute."[3] (*See* Answering Brief p. 17). For example, General Counsel's position that Cruz did not know who Downey was is simply at odds with her testimony that she became "very uncomfortable" because he was staring at her Union button. Additionally, General Counsel's argument that Cruz "took ownership of her discipline" does not disprove Respondent's position that her account of the incident with Downey is unlikely and unsupported by the record. Finally, Cruz's testimony that she said "Thank you, sir" once she returned Downey's identification is contradicted by her prior, written statement to the Board, which fails to indicate that she made this statement.

Likewise, Charging Party's contention that the ALJ correctly discredited Respondent's witnesses' testimony similarly fails. First, it is illogical to discredit Downey's testimony that he did not read the contents of Cruz's button. In fact, Downey agreed and testified that he saw Cruz's Union button and, thus, there is no reason for him to deny having read the contents of the button. Respondent acknowledges that wearing a Union button, in and of itself, is considered protected activity, so if Downey were to give a false statement, he would likely deny seeing the button altogether. Second, there is absolutely no evidence – beyond Charging Party's conjecture – that Downey could identify Cruz at the time of the incident on April 3. Additionally, Danzak's testimony that there was not an upsurge in Union activity is consistent with the record evidence, which only reflects a few emails between management in February 2014 about handbilling in the employee lunchroom. Further, during her testimony, Heath acknowledged that the incorrect dates in the timeline were a mistake – a simple error in reporting the events. In the same fashion, the variances in Rabonza's testimony are clearly within an acceptable margin of human recollection and do not contradict the overall testimony of Respondent's management witnesses. As such, any small differences in testimony are insignificant and do not establish that the events are suspect. Accordingly, the Board should disregard the ALJ's credibility findings.

[3] In its Answering Brief, Charging Party also mentions that a prior ALJ found Cruz to be credible in a separate proceeding, but this fact is wholly irrelevant to this case.

B. The ALJ Misapplied the *Wright Line* Analysis Because The Record Does Not Support a Finding That Respondent Harbored Union Animus

1. Respondent's General Statements do not Serve as Evidence of Animus

Charging Party incorrectly attempts to attribute union animus to Respondent based on a few emails and statements between management employees regarding their personal feelings towards the Union. "Animus toward unionization is not unlawful. What is unlawful is an employer's active animus toward the Sec. 7 activities of its employees to freely choose a collective-bargaining representative." *Basic Industries, Inc*., 348 NLRB 1267, fn. 5 (2006). In its Answering Brief, Charging Party argues that Respondent's "expression of its views or opinions against a union . . . can nonetheless be used as background evidence of union animus on the part of the employer." (*See* Answering Brief, p. 28). In support of its position, Charging Party cites *Sunshine Piping, Inc.* 351 NLRB 1371, 1387 (2007). In *Sunshine,* a manager made comments directed at the employee based on his activity in support of the Union as well as his testifying in the Board trial. *Id.* at 1387. Unlike *Sunshine,* however, in this case there were never any statements of animus made by anyone at Aliante toward Cruz, nor were any statements made about Cruz wearing her Union button, which she had openly worn since Respondent took control of the property.

Charging Party also cited *Tejas Electrical Services*, 338 NLRB 416 (2002), which in fact undermines Charging Party's position.[4] Specifically, in *Tejas*, the Board held that remarks that the employer "did not care for union" and that job applications of overt union organizers made one of the respondent's officials "nervous" did not establish animus. *Id.* Similarly, in this case, General Counsel unpersuasively attempted to establish animus based on limited discussions between management about their concerns with Union activity and Downey's response during the hearing that he did not want the union to represent his employees. Thus, Respondent's generalized statements regarding its concerns, or even opposition to the Union, is insufficient to establish animus.

[4] Charging Party also misplaces its reliance on *In re: Sunrise Health Care Corp.*, 334 NLRB 903, 903 (2001), as the Board did not analyze whether the employer's actions in that case actually established union animus.

Additionally, Charging Party improperly refers to Heath's advice to employees – who were being solicited at their homes – as violating section 8(a)(1) of the Act.[5] First, this allegation is not the subject of the Complaint and is a clear effort by Charging Party to muddy the issues before the Board. Therefore, this issue should not be considered by the Board. Moreover, the cases cited by Charging Party on this issue are easily distinguishable from the present case because: (1) unlike *Niblock Excavating, Inc.,* 337 NLRB 53 (2001), Heath did not write a letter to all employees telling them to call the police; her statements were limited to those employees who approached her and were reasonably concerned about solicitations at their homes; and (2) contrary to *Jerry Ryce Builders, Inc. & Illinois Dist. Council No. 1, Int'l Union of Bricklaywers & Allied Craftworkers, AFL-CIO,* 352 NLRB 1262 (2008), Heath was not telling employees to call the police on Union supporters at work. (*See* Tr. p. 380-81). Here, given the fact that everyone has an expectation of privacy in their homes and there have been cases where criminals who pretend to be solicitors in order to gain access into an individual's home, Heath's statement was made in good faith, only to concerned employees, and is unlike any of the statements in the cases cited in Charging Party's Answering Brief. Accordingly, the Board should not consider this issue, which would not violate section 8(a)(1) of the Act.

2. The Timing of Cruz's Discharge is Not Indicative of Animus

Charging Party erroneously argues that the timing of Cruz's termination is also factor in establishing Respondent's union animus. (*See* Answering Brief, p. 29). Board law is clear that "[t]iming alone is insufficient to establish a causal connection." *Royal Coach Sprinklers,* 268 NLRB 1019, 1026 (1984). As discussed *supra,* Respondent's alleged "contradictory witness stories and destroyed evidence" do not contribute to establishing Respondent's union animus. Nevertheless, Charging Party argues that the lapse of time in this case could constitute evidence of animus where there are ongoing organizing activities. (*See* Answer Brief, p. 29). In this case, however, unlike the cases relied on by Charging Party, there is absolutely no record evidence of "ongoing organizing activities" during the time that Cruz was suspended

[5] Heath's statements to the employees do not serve as evidence of an increase in Union activity in 2014, as Heath unequivocally testified that she did not make these statements in 2014. (*See* Tr. p. 381).

and later discharged.[6] In fact, Charging party did not introduce a shred of evidence that there were any organizing activities in March or April 2014. Additionally, the record does not reflect that, during this time, there were any discussions between management employees regarding the Union. Furthermore, General Counsel ignores the clear evidence that, during this same time, there were at least two other Team Members at the buffet who wore Union buttons – one of whom was selected for the trainer position. (Tr. p. 693).[7] Thus, the timing of Cruz's discharge does not constitute evidence of Respondent's union animus.

3. Respondent's Actions Do Not Establish Animus

Charging Party argues that the Board should ignore certain record testimony and infer union animus solely from Respondent's witnesses' differences in their recollection and testimony regarding the April 3 events, and Respondent's failure to preserve the surveillance footage of the incident between Downey and Cruz. Charging Party's position is unconvincing.

First, Charging Party attempts to prove animus by pointing to alleged inconsistencies in Respondent's witnesses' testimony regarding the events on April 3. (*See* Answering Brief, p. 30). Specifically, Charging Party argues that Respondent's alleged "shifting defenses" and conflicting testimony are evidence of animus, and it goes so far as to characterize Respondent's witnesses' testimony as "fabricated." (*See* Answering Brief, p. 30). Regarding the alleged "shifting defenses" and conflicting testimony, the cases relied on by Charging Party are inapposite because, in those cases, the respondent submitted a position statement to the Board, then changed its position during the hearing.[8] Those factors are not present in this case, as Respondent has consistently maintained that Cruz was discharged for her persistent performance deficiencies. Thus, Charging Party's accusations do not pass muster, as any alleged

[6] Specifically, the Board in *Advance Auto Parts* held that the timing of the discharge served as evidence of union animus because it occurred during "a time when the Union continued its interest at the DC by filing charges with the National Labor Relations Board (NLRB)."

[7] The Board has recognized that evidence of an employer's "non-discriminatory treatment of [known union supporters]" may be considered to show an employer's "lack of animus toward union activity" and is entirely appropriate to show the General Counsel's failure to meet his initial burden [under *Wright Line*]." *Nat'l Sec. Techs., LLC,* 356 NLRB No. 183, slip op. at n. 1 (2011).

[8] *See Airport 2000 Concession, LLC & Unite Here Local 7, Hotel & Rest. Employees Union, CLC,* 346 NLRB 958, 981 (2006) (finding that the testimony at the hearing was plainly inconsistent with the reason advanced for employee's termination in the position statement); *Wxgi, Inc.*, 330 NLRB 695, 710 (2000) (concluding that animus may be inferred from the shifting reasons proffered in the position statement then in testimony).

inconsistencies in testimony are so trivial that to rely on them to establish animus is to ignore the realities of human recollection. *See, e.g., Inland Container Corp.,* 240 NLRB 1298, 1300 (1979) ("Upon consideration of points made, I find any inconsistency [in witness details] to be so minor as to be insignificant."). Moreover, the ALJ ignored key, consistent testimony that showed that: (1) Cruz did not see Downey and his guests approaching the counter; (2) Cruz did not look up until the end of her interaction with Downey; and (3) these actions did not conform to Respondent's SOAR guest services standards.

Similarly, Charging Party's contention "that the ALJ properly found that Respondent's failure to preserve video evidence created a reasonable inference that the tape would have supported Cruz's testimony" fails. (*See* Answering Brief, p. 30). Respondent clearly explained why the video was not available during the hearing: Aliante only maintains digital video for seven days before it is automatically recorded over. (Tr. 270). As reflected in the testimony, there was a general misunderstanding, and apparent miscommunications, about the preservation of the surveillance video. Despite Charging Party's implications, which it would like the Board to believe, Respondent did not intentionally destroy the surveillance video. Moreover, the absence of the surveillance video does not negate Cruz's persistent performance problems and, as Danzak testified, his decision to terminate Cruz's employment was based solely on his review of her active employment record that reflected these persistent problems. Accordingly, there is no evidence – beyond General Counsel's speculation and conjecture – that Respondent intentionally failed to preserve the relevant surveillance video and, thus, discriminatory animus cannot be derived from such an oversight.

4. Cruz's Termination Was Not Abrupt

In its Answering Brief, Charging Party argues that the "abruptness" of Cruz's termination, in light of Respondent's prior treatment of Cruz for alleged incidents of discourtesy, favored an inference of animus. (*See* Answering Brief, p. 31). Charging Party's position mischaracterizes the record and completely ignores Cruz's record of performance deficiencies. Further, Respondent discharged Cruz after

providing her with multiple opportunities to correct her behavior. Undoubtedly, if Respondent had terminated Cruz in May 2013, without giving her an opportunity to correct her behavior, Charging Party would still be disputing Respondent's decision based on the fact that Cruz wore her Union button at that time. As such, Cruz's discharge after she received two prior discipline and three coachings in a one-year timeframe cannot be described as abrupt. Finally, as discussed below, Charging Party did not introduce any evidence that Cruz received disparate treatment than other employees who engaged in the same persistent behavioral problems.

C. Cruz Would Have Been Discharged Even Absent Union Activity

Charging Party erroneously argues that Respondent failed to meet its *Wright-Line* burden. Charging Party's argument is premised on the finding that Respondent failed to prove that Cruz violated the SOAR standards. (*See* Answering Brief, p. 33). The Board has found, however, that it is not necessary for a respondent to prove that the misconduct actually occurred in order to meet its burden under *Wright Line; Affiliated Foods*, 328 NLRB 1107, 1107 n. 1 (1999). In this case, the record reflects that Danzak decided to terminate Cruz based on the information that he received, which indicated that she had violated the SOAR standard on April 3, coupled with a review of her performance deficiencies and discipline from the prior year, which included a documented coaching, three verbal counselings, and a written warning. Contrary to Charging Party's contention, Respondent's commitment to providing exceptional guest services is not a smokescreen, but the essence of its business. Cruz acknowledged that the primary purpose of her position was to provide superior service and, yet, despite receiving various counselings on her poor guest service performance, she failed to meet Respondent's standards. To find that Cruz's termination was motivated by anything other than her failure to meet Respondent's guest service standards requires the Board to ignore Cruz's employment history, which reflects persistent deficiencies in this same area. Thus, regardless of any other factors, Respondent would have terminated Cruz because her continued guest service failures contravened the very nature of the position in which she worked.

Additionally, based on Cruz's continued problems with guest services and the importance of this function to her position, her discharge is not disproportionate. If, for example, Cruz would have been terminated after the May 2013 incident, which was Cruz's first incident in the one-year look-back period, Respondent could, at the very least, understand Charging Party's position. However, in April, Cruz had two back-to-back incidents relating to poor guest services. At that point, based on the continuous nature of her behavioral problems, and the importance of guest services to her position, it was clear that Respondent had to discharge Cruz because it "couldn't continue to have someone delivering that type of service." However, this discharge was not disproportionate because Cruz was afforded numerous opportunities (all while she wore her Union button) to comply with Respondent's guest services standards, but in the end, she failed to meet those standards.

Finally, Charging Party incorrectly argues that there were other employees that were treated more leniently than Cruz. (*See* Answering Brief, p. 34). To be relevant, proffered comparators must be similarly situated employees who deal with the same supervisor and are subject to the same standards governing performance evaluation and discipline." *See, e.g., MEMC Electronic Materials, Inc.,* 342 NLRB 1172, 1198 (2004) (Finding that the comparators were not similar because there was no evidence presented that they were supervised by the same supervisors and managers as the alleged discriminatee). In support of this position, Charging Party refers to the other employees who committed allegedly-comparable violations as Cruz, but were not discharged. (*See* GC Exh. 36). In this regard, however, Charging Party fails to establish that the violations by these alleged comparators were similar to Cruz's violation. *See Dish Network,* at *3. Specifically, there is no evidence that any of these other employees were disciplined for being discourteous on three separate occasions in a one year time frame, during which she also received three coaching sessions for the same behavior; nor that any of these employees displayed poor guest services in front of the General Manager. As such, the discipline of these other Team Members does not and cannot establish that Cruz received disparate treatment because of her Union activity.

III. CONCLUSION

In sum, the arguments advanced in the Answering Brief fail to discount or otherwise discredit Aliante's exceptions. First, the ALJ's credibility determinations were erroneously-labeled and should be reversed. Additionally, the record does not support the ALJ's finding that Respondent harbored Union animus and, as a result, General Counsel did not establish a *prima facie* case under *Wright-Line.* Moreover, there is absolutely no evidence of ongoing union organizing at the time Cruz was suspended and discharged. What the record shows is that Cruz persistently failed to meet Respondent's guest services standard and that she was counseled several times for these deficiencies during the last year of her employment. This counseling and coaching proved futile, however, as Cruz again violated Respondent's guest services standard on April 3, 2014, but on this occasion, she did so in the presence of Respondent's General Manager. Given the persistent nature of her performance deficiencies, Cruz's discharge was not disproportionate to her violation, nor is there any evidence that other employees engaged in the same behavior, but were disciplined more leniently.

Therefore, based on Cruz's continued failure to meet Respondent's guest services standard, Respondent terminated her employment. Accordingly, as laid out in Aliante's Exceptions Brief and further explained above, the ALJ's decision regarding Cruz's suspension and termination is erroneous and should be rejected by the Board.

Date: June 9, 2015

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that on this 9th day of June 2015, the undersigned, an employee of Fisher & Phillips LLP, electronically filed the foregoing **RESPONDENT'S REPLY BRIEF TO CHARGING PARTY'S ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS TO ADMINISTRATIVE LAW JUDGE'S DECISION** via the E-Filing system on the NLRB's website, and a copy was electronically transmitted to:

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